

United States District Court



**REPORT
ON
MEDIATION**

2007 - 2008

I. PROGRAM OVERVIEW

2007 - 2008 marked the twelfth and thirteenth years of the mediation program. There have been considerable changes in the program over these years. This report will not attempt to review all of the historical developments of the program. Previous reports provide detailed historical context. This report attempts to review recent changes in the program and the effects of those changes.

Program Revisions

The pretrial progression process was changed to include the following:

- Magistrate judges will include in initial progression orders the court's "expectation" that the lawyers and parties explore mediation
- The lawyers in a case will be required to report to the court their compliance with the court's expectation that they discuss mediation with their clients and opponents prior to the planning conference at which a trial date is determined
- Planning conferences will be postponed until the mediation report described above has been received
- Planning conferences may be postponed until the parties have reported that they have exchanged settlement proposals
- The court will send educational materials regarding mediation with its annual assessment notices
- During planning conferences magistrate judges will inquire as to the lawyers' and parties' willingness to mediate the case, and if there is no good reason not to mediate, will require a subsequent report on their efforts to schedule a mediation
- All trial judges will encourage mediation and settlement negotiations at every stage of the case
- Judges may require clients to attend and participate in planning conferences in person or by phone
- The court may request that experienced mediators allow other mediators to observe their mediation with the parties' consent

- The court may offer or participate with others in offering training to lawyers on “how to represent your client in mediation”
- The court will re-start its mediation training agenda

On August 23-25, 2007, Federal Practice Advanced Mediation Training was held at the Roman L. Hruska U.S. Courthouse in Omaha, Nebraska. This training was sponsored by Creighton University’s Werner Institute for Negotiations and Dispute Resolution and the Nebraska Federal Practice Committee. There were 23 attendees who completed this training.

The trainers/presenters at this training included:

- Jacqueline Font-Guzman, Assistant Professor and Associate Director, Werner Institute
- Douglas K. German, Executive Director, Legal Aid of Nebraska
- David A. Hubbard, Director, Facilitation and Training, The Mediation Center
- Arthur Pearlstein, Professor of Law and Director, Werner Institute

There have been continuing requests for future federal mediation training from attorneys who wish to become approved federal mediators. Chief Judge Bataillon will raise these training issues with the Federal Practice Committee to see if this training will be offered in the next 12 to 18 months.

Chief Judge Bataillon will also ask the Federal Practice Committee to review the Mediation Plan for the United States District Court, District of Nebraska, which was last amended on January 30, 2004. He also will ask that an ad hoc committee be formed to review the plan and make recommendations for any changes.

The court will continue to keep and report statistical data concerning the plan.

II. MEDIATION STATISTICS, 2007 - 2008

A. Raw Numbers

Period: January 2007 - December 2008

	Mediator Approved	Mediator Not Approved	Total
Referrals Pending Beginning of Period	2	5	7
Mediation Orders Entered	54	40	94
Mediation Orders Withdrawn	5	7	12
Settled Prior to Mediation Session	3	7	10
Referrals Pending End of Period	5	1	6
Total Cases Mediated (With MRO) ¹	43	30	73
Cases Mediated (No MRO)	18	24	42 ²
Total Cases Mediated	61	54	115
Mediation Reference Orders, by Division	Mediator Approved	Mediator Not Approved	Total
Omaha	30	12	42
Lincoln	20	24	44
North Platte	4	4	8
Total	54	40	94

¹ "MRO" means "Mediation Reference Order."

² Some mediations take place without entry of a mediation reference order. They are counted when they are reported by the attorneys to have settled or when there is a final pretrial conference. If a mediated case ends by involuntary dismissal or summary judgment, however, the court is not always informed of the fact or results of that mediation, so there could have been more "No-MRO" mediations than appear in this report.

Cases Mediated Without MRO, by Division	Mediator Approved	Mediator Not Approved	Total
Omaha	16	17	33
Lincoln	2	5	7
North Platte	0	2	2
Total	18	24	42
Outcome of Mediated Cases (MRO)	Mediator Approved	Mediator Not Approved	Total
Full Agreement	30	22	52
Partial Agreement	0	1	1
No Agreement	13	7	20
Outcome of Mediated Cases (No MRO)			
Full Agreement	18	19	37
No/Partial Agreement	Unknown	5	5³
Total	61	54	115
Summary of No/Partial Agreement, After Closure	Mediator Approved	Mediator Not Approved	Total
Trial Settings Pending Beginning of Reporting Period	3	16	19⁴
No or Partial Agreement, This Period (from above)	13	13	26⁵
Settled	11	23	34
Judgment Entered Without Trial or Settlement	2	2	4
Transfer to Bankruptcy	0	0	0
Trials Held During Reporting Period	2	1	3
Trial Settings Pending at End of Reporting Period	1	3	4

³ Because of the inherent authority in tracking "No MRO" cases (see Note 2, above), there could have been more cases that had "no" or "partial" agreements.

⁴Of the 19 trial settings that were pending at the beginning of the reporting period, 17 of those cases settled during this period, one trial was held, and in one case the defendant's motion for summary judgment was granted.

⁵Of the 26 cases that were mediated during the calendar years 2007 through 2008 and had a partial or no agreement, 17 of those cases settled during this period, defendant's motion for summary judgment was granted in two cases, plaintiff's motion for summary judgment was granted in one case, two trials were held, and four cases remain pending for trial.

B. Follow-up Surveys

Survey questionnaires were sent to counsel in the 17 cases mediated in 2007 and 2008 which did not settle at the mediations, but which DID settle later, and in the 17 cases that were set for trial at the beginning of 2007, but which DID settle later, to determine if the settlements occurred "because of" the mediation, "in spite of" the mediation, or if the mediation had "no impact" on settlement. Responses were received from 44 attorneys in the 34 cases:

TOTAL **RESPONSES**:

MEDIATOR	"Because Of"	"In Spite Of"	"No Impact"	Total
APPROVED	12	3	4	19
NON-APPROVED	15	0	10	25
TOTAL	27	3	14	44

CASES REPORTED ON:

MEDIATOR	"Because Of"	"In Spite Of"	"No Impact"	Total
APPROVED	7	2	2	11
NON-APPROVED	10	0	13	23
TOTAL	17	2	15	34

This pattern of very few cases being settled after a mediation "in spite of" the mediation has been consistent over the life of the mediation program,⁶ but particularly for the last four years. Thus, even if cases do not settle "at the table" during a mediation, there is little likelihood that mediation would harm settlement prospects.

⁶ The numbers of cases settled after an unsuccessful mediation, in which the attorneys said the case settled later "in spite of" the mediation are as follows:

1998: 3 of 20 later settled cases
1999: 4 of 15 later settled cases
2000: 2 of 13 later settled cases
2001: 0 of 9 later settled cases
2002: 2 of 16 later settled cases

2003: 0 of 15 later settled cases
2004: 2 of 10 later settled cases
2005: 2 of 6 later settled cases
2006: 1 of 5 later settled cases
2007/2008: 2 of 34 later settled cases

III. OBSERVATIONS FROM THE NUMBERS

A. MEDIATION "CAUSED" SETTLEMENT IN 88% OF THE CASES MEDIATED:

Adding the cases settled at the mediations (85) and those later settled "because of" the mediation (17) yields a total of 102 of the 115 cases actually mediated (88%) were settled directly because of the mediation program.

Effects of Mediation on Settlement, 2007-2008:

Mediator	Cases Mediated	Settled AT Mediation	Settled "Because of" Mediation	Total Cases Settled	Effective Rate of Settlement
Approved	61	46	7	53	86%
Non-Approved	54	39	10	49	90%
Totals	115	85	17	102	88%

B. THE PATTERN OF FEW TRIALS IN POST-MEDIATION CASES⁷ CONTINUES:

There were 45 post-mediation cases tracked in 2007 and 2008 (19 still pending trial at the beginning of the year, plus the 26 mediated in 2007 and 2008 without settlement). Of these 45, only three cases have been tried, and four remained set for trial at the end of 2008. In the last 10 years (January 1, 1998 through December 31, 2008), there were 568 cases mediated, and 180 of those cases were not settled "at the table." Of all these cases, only 28 cases have later gone to trial, again with four cases remaining set for trial at the end of 2008. The highest number of trials of post-mediation cases in one year was six in 2000.

C. IN 2007/2008 APPROVED AND UNAPPROVED MEDIATORS HAD ROUGHLY THE SAME RATES OF SETTLING CASES "AT THE TABLE":

The number of mediations and rates of settlement, divided according to whether or not the mediator was approved by the court, are below:

⁷ "Post-mediation cases" are those that did not settle during the mediation itself.

2007-2008	Approved	Non-Approved	Overall Totals
Total Cases Mediated	61	54	115
Cases Settled In Mediation	46 75%	39 72%	85/115 73%
Effective Settlement Rate	53/61=86%	49/54=90%	102/115=88%

The differences in results as between approved and non-approved mediators has fluctuated over the last several years, the only years results were so calculated.⁸ Those results are in the next section.

D. OTHER OBSERVATIONS:

Number of Cases Mediated: The number of mediations (115) was slightly above average. In the past seven years the number of mediations in federal cases has hovered around fifty per year; except for 2002 when there were 70 mediations and 2005 when there were 29 mediations.

Number of Mediation Reference Orders: There were 94 MROs entered in 2007/2008. This number is up from 35 MROs entered in 2006. Compared with the average number of mediated cases, this means that more attorneys are seeking mediation services without the involvement of the court. If the attorneys do not want to stay the progression of the case during the pendency of the mediation, and have no qualms about the need for sanctions if something goes wrong at the mediation, they have no need to seek an MRO. However, when the court enters an MRO, it helps the court follow the case and tabulate the results of the mediation. In addition, since the court “stands behind” the approved mediators with (a) greater willingness to require certain preparatory actions for mediations and (b) more authority to sanction parties and/or counsel if they do not abide by the order, obtaining an MRO is a good idea.

Geography: More of the 2007/2008 mediation reference orders emanated from Lincoln. In the past, most of the mediation reference orders have emanated from Lincoln. There are more mediations without MRO's in Omaha cases than Lincoln.

⁸ In years before 2001 the statistics were divided by whether the mediator was contacted through a mediation center or directly by the parties, not by whether the mediator was approved by the court. Since 2001 the statistics have distinguished mediators by their approved/non-approved status and counted the results accordingly.

Number of Approved Mediators: At the end of 2007 there were 29 approved mediators and at the end of 2008 there were 26 approved mediators. This is down from 28 at the end of 2006.

Does mediation save time or money? Participants were also asked to state if they thought their mediation saved them time and/or money in resolving the case when and how they did, and if so, how much. There were perhaps too few of these “guesstimates” to average meaningfully,⁹ although the numerical grade responses to the questions indicate some perception of savings.

EVALUATION QUESTION	PRTY	ATTY	OVERALL AVERAGE
“To what extent do you think the mediation saved you money in resolving this case?”	2.01	1.60	1.79
“Please ‘guesstimate’ how much money saved”	\$39,602.63	\$37,255.81	\$38,356.79
“To what extent do you think mediation saved you time in resolving this case?”	1.63	1.33	1.47
Please ‘guesstimate’ how much time saved, i.e. “hours of attorney time”	100.54 hrs.	154.64 hrs.	131.89 hrs.

⁹ Money Saved--Attorneys: 43 estimates (High of \$200,000 and low of \$1,000).
Money Saved--Parties/Insurers: 64 estimates (High of 150,000 and low of \$400).
Time Saved--Attorneys: 51 estimates (High of 1,000 hours and low of 4 hours).
Time Saved--Parties/Insurers: 37 estimates (High of 1,000 hours and low of 3 hours).

APPENDIX

1. EVALUATIVE COMMENTS, 2007-2008I
2. EVALUATION QUESTIONNAIRE FORMSxi

1. EVALUATIVE COMMENTS, 2007-2008

A. PARTIES' COMMENTS ON EVALUATION FORMS

The evaluation forms were distributed to participants in the mediations held through the auspices of approved federal mediators as well as the non-approved mediators. The comments received from the parties and insurance company claims representatives appear below:

In Cases That Did Settle During the Mediation Session (Approved Mediator):

"Would never have settled without mediation."

"_____ does a very good job as the mediator."

"Mr. _____ was very professional and sincere. I was very nervous when I arrived for the mediation, but Mr. _____ made me feel comfortable immediately. I felt like I was really being heard. He did his job in the most professional manner. I would strongly recommend his services to others who might go through an experience that could be settled out of court. Mr. _____ is very compassionate about his job and it showed during the mediation."

"The process was amazing to witness. I feel this process saved time and money - undoubtedly - for both my attorney and myself. Mr. _____ was a constant professional, whose expansive knowledge of the law was incredibly instrumental in facilitating my settlement."

"Afterwards, there was an issue with payment of wages that we didn't agree to, but the plaintiffs' said it was portrayed to them by the mediator."

"Plaintiff claimed that mediator promised payment of wages during interim. We never discussed this. Hard to say if this was plaintiffs' misunderstanding or mediator promising something we didn't discuss or agree to."

"Without the mediator I don't think we would have reached a settlement."

"_____ was good - I knew the plaintiff and her position - he relayed her thoughts and position to a T! I hope/assume our points were also as accurately relayed. I was impressed with our counsel and the mediator."

"I believe the process could've lasted longer. I felt rushed during the end of the process because the attorneys were late for lunch. If I ever have to do this again, I believe I will proceed with court proceedings. The only reason I settled was to get on with my life and put this behind me. If any of the persons involved ever lose what I did . . . I will have no compassion for them!"

"We would be happy to use Mr. _____ again at any time."

"I'm very familiar with _____ - Both parties have used Mr. _____ many times - He's the best I know of in Omaha/Lincoln, especially at learning/understanding the nuances of a RR - FELA - personal injury case. I highly recommend _____ - over the years he's helped successfully resolve over 90% of our cases."

"In this case the legal issues were not really at issue. Defendant simply took the position that it was financially unable to pay the entire outstanding amount."

"Very open."

In Cases That Did Settle During the Mediation Session (Non-Approved Mediator):

"The mediator did a great job, _____ is who drug the process out."

"Thanks!"

"He did a great job! Very easy to understand and didn't make me feel uncomfortable."

"The mediator made me feel very relaxed. He didn't speak down to me and treated me with dignity and respect. I truly appreciate that. I don't want to go through this any time soon, but if I did, Mr. _____ would be an excellent mediator to have again."

In Cases That Did Not Settle During the Mediation Session (Approved Mediator):

"Felt comfortable with Mr. _____ as the mediator and he explained things well."

"In this case the parties involved did not all appear to participate with the intention of resolution."

"I would have liked a mediator who was more experienced and/or was specialized in employment law/mediation."

"Due to his extensive experience in the Labor and Employment Law area, Mr. _____ is invaluable as a mediator. This case involved 2 fairly intricate issues which would likely have resulted in Plaintiff's claims being legally precluded. His expertise was likely instrumental in convincing the Plaintiff that he would likely end up with nothing in the end."

"Movement made toward settlement. That is progress. Looking forward to continuing the mediation process and coming to an agreement/settlement."

In Cases That Did Not Settle During the Mediation Session (Non-Approved):

"Mediation generally works well, but in this case defendants appeared to have motives other than settlement."

B. ATTORNEYS' COMMENTS ON EVALUATION FORMS

In Cases That Did Settle During the Mediation Session (Approved):

"_____ is excellent and got the case settled."

"_____ always does an excellent job!"

"I was impressed w/process - but can't offer comments as worthwhile to you as the other attorneys for lack of experience. Experience was highly informative and enjoyable and helpful as I deal with future claims. Thanks!"

"_____ was instrumental in getting this case settled."

"This was a difficult case having a current employee and negotiating her departure from the employer. The outcome mediated would not have occurred if we went to court. She would have continued to work or later left employment for other reasons or been terminated. _____ did a great job!"

"_____ did a great job on this ERISA case. It is good to have a lawyer familiar with the issues. We may well have settled anyway, however, Mr. _____ and I had trouble setting aside the time to think things through."

"_____ did a great job with a difficult fact pattern - It was very helpful to have his insight so that my client understood."

"_____ does an outstanding job of keeping the parties on the right path - very professional."

"_____ does a fine job as you would expect."

"His approach forced our client to change her expectations."

"_____ did an excellent job in mediating this case."

"The mediation process was very conducive toward achieving settlement, especially if the principals or clients attend."

"_____ was very pleasant and easy to work with."

"The increasing conservative nature of the court has made negotiations increasingly difficult from plaintiff's perspective."

"Mr. _____ is an outstanding mediator. We would definitely use him again for mediations."

"A great process. Mr. _____ is an excellent listener and mediator."

“Difficult case - would not have settled with a less prepared mediator on the issues.”

“_____ did a great job. He is very knowledgeable in this area of the law.”

“_____ has an extensive background in substantive labor and employment law. That is invaluable in the mediation of employment litigation.”

In Cases That Did Settle During the Mediation Session (Non-Approved):

“Mr. _____ was thoroughly prepared.”

“Mr. _____ is a very effective mediator. I would definitely consider using his services again.”

“I was doubtful at first that mediation would resolve the matter because of the strong feelings on our side (plaintiffs). The mediator was trustworthy and conscientious and, above all, realistic and knowledgeable.”

“Without the evaluative input of the mediator based on his previous experience, this case would not have settled.”

“Mr. _____ was excellent.”

“Mr. _____ is an outstanding mediator. We would be happy to use him again!”

“Mr. _____ is the best mediator in the business.”

“This was a difficult case to mediate. I was very impressed with Mr. _____ and he did an outstanding job. My client was equally impressed and very satisfied.”

“_____ did a nice job.”

“_____ did a great job. He agreed with our position but was able to deliver a strong message to motivate my client to achieve a settlement. By the way, the other party moved from zero offer to settlement. I can only conclude he was equally effective in the other mediation room. I didn’t expect a settlement.”

“_____ did an outstanding job.”

“_____ did a great job letting the clients discuss their feelings.”

“_____ did an excellent job with a difficult plaintiff’s husband. He kept control at all times.”

“_____ did a good job.”

“We would not have agreed to mediate this matter if the mediator was not a lawyer or a judge. Mr. _____’s experience as a litigator was an essential component of the successful resolution of this

matter. It would have been helpful to have more information about the background and experience of the mediators included in the Federal Court's mediation program."

"_____ does an excellent job. He's very respectful of the parties' positions and lets the case move along."

"

"Fee was fair for Lincoln - high for western NE. _____'s western Nebraska roots typically helps his credibility with my western Nebraska clients."

In Cases That Did Not Settle During the Mediation Session (Approved):

"_____ did about as well as he could, but we were unable to resolve the case."

"Mr. _____ does not speak English and I think you lose things in translation process. _____ does a great job."

"Mr. _____ did a fine job with the parties. Settlement, however, was not possible as plaintiff's demands were unrealistic."

"Although this case did not settle, _____ was very helpful in getting both sides closer together and thinking about other avenues to resolve the case."

"It was clear from the mediation that the process will work only if both parties come to the mediation truly committed to attempting to reach a resolution."

"Tough one - almost impossible - to settle. Certainly not the mediator's fault."

"_____ did a good job, but I think it was too early."

"_____ was very professional and had a good understanding of both the process and the law. Although mediation in this case was not successful, I believe that it was beneficial."

"We didn't sign any sort of agreement so I am not sure what his feel was and there was nothing to explain confidentially to the client."

"I do not believe the Defendants engaged in total sound faith negotiations, since a monetary amount was not offered to settle the case."

"_____ did a great job in quickly determining that the parties were not able to reach an agreement - offers were too far apart with no movement from either side."

"Mediator did a fine job."

"Not quite resolved....."

"Mr. _____ did a fantastic job working through several liability damages issues with the parties and got us close to a settlement. The case later settled."

In Cases That Did Not Settle During the Mediation Session (Non-Approved):

"Once we commenced it was apparent that the parties had a fundamental disagreement. The mediator tried but was unable to bridge the point."

"_____ was excellent! I will refer him to anyone without hesitation. Thank you for your time."

"Mr. _____ was an excellent mediator; the case did not resolve because the parties disagreed on the amount of damages and common ground was not present. As discovery proceeds, case may settle."

"The case did not settle, however it was not the fault of the mediator."

"_____ is an excellent mediator. Case failed to settle due to stubbornness of the parties."

C. ATTORNEYS' COMMENTS RECEIVED IN FOLLOW-UP SURVEY

Approved: "Because Of":

"Even though this case did not settle during mediation, I felt mediation was productive in enlightening my client on other's perceived valuation and perhaps gave my client a more realistic view of the case and the defenses to it. Sometimes one needs to hear it from a third party. Although not the only factor, I believe the mediation was helpful in reaching a settlement."

"The parties were able to better understand each other's positions and begin to explore more creative and non-traditional alternatives for resolving their dispute that resulted in a business buy-out which eliminated the trademark claims. I think both sides were faced with the reality that continued litigation would result in significant legal fees with no real assurance that either party would ultimately end up in a favorable position. I think it largely depends upon the ability of the decision makers to get past whatever perceived 'wrongs' led up to the litigation and change the focus to potential solutions that present benefits to both sides. Having said that, I'm not sure this is anything new. That is, in any settlement endeavor, the parties need to make these adjustments."

"The parties simply needed more time to clarify their positions."

"Plaintiff became aware how far the defendant would go to settle the case and eventually agreed to that amount after mediation. Caused both sides to think seriously about settling the case."

"I think my client got a better picture of the risks of litigation as explained by the mediator."

"This case settled within 1-2 hours after the mediation. Plaintiff and his counsel visited while walking to her office and she placed a call to me within less than an hour to accept defendant's last proposal. Mr. _____ did a very good job as mediator. His employment law background and expertise is invaluable in getting the parties to realistically assess their position, strengths, weaknesses, etc."

"A decision maker was at mediation. Best offer was put on table at that time. Case settled shortly after mediation."

Approved: "In Spite Of":

"Plaintiff ended up passing away after failed mediation and one week before trial. Case settled for this reason."

"Mediation was a disaster. The defendants came to the mediation with absolutely no intention of making a good faith effort to settle. After the mediation, my client was more determined than ever to push the case all the way to trial, largely because of the defendant's attitude at mediation. Fortunately for my client we ended up settling several months later for a sum far in excess of that which my client was willing to settle for in mediation."

"In this particular case, I believe the formalities of mediation caused the plaintiff to start at a level unsupported by even the most favorable facts. The matter settled without assistance after brief negotiations between counsel. This case was not typical of my experience with mediation generally as a means of dispute resolution. Normally very effective."

Approved: "No Effect":

"The case settled after plaintiff renewed our motion for summary judgment. The mediation was useful, but this time did not really impact settlement."

"This was an employment discrimination case. The main factor, in my experience, in these types of cases that influence settlement is the court denied the defendant's motion for summary judgment. I think that dispositive motions should be early on in these cases to foster settlement. Mediation should be required, if at all, early in the case before the defendant pays attorney bills. That is always a factor in settlement discussions late in cases. Cases that have been through administrative investigations like the EEOC/NEOC process have most of the discovery done early so mediation can be meaningful early in the case."

"I believe whole heartedly in mediation. This was an aberration, not typical."

Non-Approved: "Because Of":

"From our perspective, the first mediation session was premature and the parties were not ready to engage in serious settlement discussions. The second mediation was, in our opinion,

worthwhile even though it did not result in settlement. Again, the parties were too far apart in their respective settlement positions. However, the parties were closer to settlement following the second mediation than they had been following the first mediation. The third mediation did not result in settlement. However, the parties did move closer together in the settlement positions and we think the third mediation was a positive contributing factor that ultimately led to the settlement of all of the cases. These cases were very complex and involved numerous difficult issues of both law and fact. The parties had very strong feelings. Mediation and settlement efforts were further complicated by the large number of parties and the desire by all parties and all counsel to settle all of the cases simultaneously. Our general feeling is that the mediations were helpful in accomplishing settlement and we definitely are proponents of mediation in future cases.”

“The parties participated in two mediations before two separate private mediators approved by the Court. Although both mediations ended without a settlement, the mediations (particularly the second) were indispensable in enabling the parties to reach an accord. The two mediation sessions, while unsuccessful alone, were indispensable in identifying the issues and obstacles to settlement and clarifying the strengths and weaknesses of the parties’ claims and defenses.”

“The mediation was instrumental in obtaining settlement of the third-party claims, as it brought the parties and the principal decision-makers together in the same place, resulting in a settlement of those claims. Attempts to resolve these claims prior to mediation were unsuccessful. The third-party claim did settle at the mediation.”

“The mediation got the parties thinking in terms of settlement whereas discussions had been at a total standstill previously. _____ was an excellent mediator and was very good about pointing out weaknesses in each party’s position - whether those parties were listening to him and processing what he said at the time is another matter, but even if they don’t hear him then, he has planted the seed for later consideration.”

“Because of might be overstating it, but the mediation did play a material role in facilitating the settlement. _____ did a great job of bringing 4 diverse parties together, getting the discussions moving, and supporting a framework for resolution.”

“Made the parties look more realistically at the case so that they could more effectively reach a business settlement through the business people acting on behalf of the various parties.”

“The mediation was held late in the case; the parties’ positions were well developed. The discussion allowed the parties to explore a mutually-potable business-oriented settlement, although agreement was not reached until just before trial. The ideas exchanged during mediation helped to lay a foundation for later talks. Had the mediation come earlier in the case, I don’t believe that it would have been effective.”

“At the time of the mediation, the parties were not in a position to ultimately resolve the case. The mediation was successful however in that the parties and counsel were able to discuss key issues and were able to relay those points directly to the parties and counsel.”

“Opportunity for parties to meet and discuss legal issues.”

"The mediation was probably helpful. Defendant's insurance adjustor did not show up, which did not help the mediator. It is almost always helpful in my opinion, but not always successful. I am a proponent of mediation. I believe it would be helpful if the parties were pushed into it earlier, but I think some attorneys resist it."

"I would say that the case settled because of mediation, even though not during the mediation session in that specifically Plaintiff's counsel had to, after evaluation of Plaintiff's claims at mediation, reevaluate their case and contact some surrogated medical providers as to the potential for settlement. The case settled at some brief period following mediation because Plaintiff, having considered information obtained at mediation, was able to reduce their demand to conform to Defendant's offer."

"We mediated the case twice. The case did not settle at either. The mediation was helpful only to the extent it allowed plaintiffs to resolve some of their emotional issues. On balance - helpful."

"We were directed to engage in mediation and the parties agreed upon a mediator who was every competent and skilled. However, after two mediation sessions, the case did not settle. In my opinion the case did not settle after the mediations for two reasons. First, we were required to conduct mediation before enough discovery had taken place. Thus, the parties did not have enough information to make a realistic evaluation. The second reason the case didn't settle was that it was too close to the child's death. The family was so grief stricken that it was not realistic to expect them to go through a mediation at that point. The mediator did give the parties a figure that he felt would be fair. This figure ultimately became helpful in getting the matter resolved. It has been my experience in wrongful death cases that some time has to pass before the survivors are able to focus on mediation in a meaningful way. The lawyers in this case were experienced, and perfectly capable of determining if and when mediation had a reasonable chance of success. Thus, I would recommend that the timing of the mediation be determined after consultation with counsel, and an evaluation of the particular circumstances of the case. In other words, a rule requiring mediation for all cases at the same stage of the proceeding is not realistic in my opinion."

"Without a doubt the mediator's evaluation caused the plaintiffs to rethink the value placed on the case. In that regard, even though the mediation failed, it was helpful. In serious and complex cases there is simply no downside to mediation. More often than not something good comes out of the process."

"The case settled after mediation because the parties exchanged information both during the mediation and after the mediation which set forth the condition of the facilities such that the plaintiff was thereafter willing to compromise regarding its position concerning damages. The mediation was helpful in bringing the parties together and permitting an exchange of information which ultimately resulted in the resolution of the case. It is possible that the case might have settled without mediation; however, it is clear that going to mediation and listening to the other side's position and providing information which delineated our position was fundamental in security a resolution."

"Mediation offered opportunity for principals to see each other face-to-face. That helped."

“Mediators did have the effect of making the parties examine the strengths and weaknesses of their positions. What occurred at the mediation even though the case did not settle at that time, helped once the parties began settlement discussions a couple of months later. I like “interest-based” mediation, although I will not agree to a mediation in the future unless significant offers have been exchanged in advance of the mediation. Defense counsel are using mediation as a tool to find out what plaintiffs are willing to do but are not similarly interested or motivated to settle.”

“The groundwork for settlement was established during the mediation. The parties needed some time to rethink their positions after the mediation failed. Within a couple of weeks an agreement was reached and those terms were very similar to those proposed at the mediation.”

Non-Approved: "In Spite Of":

No comments were received.

Non-Approved: "No Effect":

“In my opinion, mediation was not a catalyst to settlement of the cases. I do not believe the cases were settled because of mediation or in spite of mediation, but I believe the process had no impact on the ability to reach a settlement.”

“Settlement was not possible in these consolidated cases until after the first was tried.”

“The mediation made no progress toward settlement and may have made settlement more difficult. This case was resolved because (1) the court granted summary judgment against plaintiff on the complaint, and (2) the court would not allow defendant to amend its’ counterclaim.”

“Additional court involvement - whether by status conferences or live motion hearings to give the parties and the court more familiarity with the issues, positions, and potential outcomes would be helpful during the case and certainly before court-ordered mediation.”

“In this case, the mediation was not effective. The Defendant agreed up front to bring a certain representative who had decision-making authority and, at the last minute, brought someone else instead. That frustrated the entire mediation. In any case of any significance, mediation plays an important role, even in those situations where the mediation does not result in a settlement. It forces the parties’ representatives and their lawyers to take time out of their busy schedules and focus on the issues of the case. I can’t think of a case where I did not recommend mediation.”

“Despite the fact that mediation had no impact on the settlement of this matter, I am a huge believer in the process and think it should be court-ordered more often.”

2. EVALUATION QUESTIONNAIRE FORMS

FORM 1: EVALUATION OF MEDIATION—ATTORNEYS

Name of Case: _____ Number of Hours in Session(s): _____

Mediator(s): _____

Date, Place of Mediation Session(s): _____

I am: _____ plaintiff(s) attorney
_____ defendant(s) attorney

This mediation resulted in:
_____ full settlement of case
_____ partial settlement
_____ no settlement of the case

For each question below, please circle the response that reflects your opinion, using the following key for your answers: 1="Excellent!"; 2="Good"; 3="Adequate"; 4="Poor"; 5="Terrible!"

1. How efficient was the procedure of court referral and arranging the mediation session? 1 2 3 4 5
2. How was the mediator at explaining mediation? 1 2 3 4 5
3. During the mediation session(s), how was the mediator at:
 - a. Giving you opportunities to express your views? 1 2 3 4 5
 - b. Understanding your client's interests and needs in this dispute? 1 2 3 4 5
 - c. Treating you with fairness and respect? 1 2 3 4 5
4. How was the mediator at remaining neutral? 1 2 3 4 5
5. How well were the legal issues of the case identified and discussed during the session? 1 2 3 4 5
6. How was the mediator at allocating appropriate time for the mediation without rushing you to reach an agreement or dragging out the process? 1 2 3 4 5
____ Moved too quickly ____ Moved too slowly ____ Paced right

7. If you reached full or partial agreement,

- a. To what extent was the mediator responsible for it? 1 2 3 4 5
- b. To what extent do you think the mediation saved you money in resolving this case? 1 2 3 4 5
- c. Please "guesstimate" how much money saved: \$_____
- d. To what extent do you think the mediation saved you time in resolving this case? 1 2 3 4 5
- e. Please "guesstimate" how much time saved:
_____ hours of attorney time
8. If you reached full settlement, in your view, would the case have settled later without mediation?
_____ yes _____ no
9. If you reached only partial agreement, to what extent was the mediator helpful in identifying possible areas of future agreement? 1 2 3 4 5
10. From this experience, how satisfactory do you think mediation is to resolve other disputes in which you might be involved? 1 2 3 4 5
11. Overall, how would you rate the mediation process in your case? 1 2 3 4 5
12. How appropriate was the fee? ____Too High ____Too Low ____ About Right
13. How helpful was it that the mediator was a lawyer? ____Very ____Somewhat ____ Not

COMMENTS: _____

THANK YOU!!

FORM 2: EVALUATION OF MEDIATION--PARTIES AND INSURERS

Name of Case: _____ Number of Hours in Session(s): _____

Mediator(s): _____

Date, Place of Mediation Session(s): _____

I am: _____ plaintiff
_____ defendant
_____ plaintiff's insurer/subrogee
_____ defendant's insurer

This mediation resulted in:
_____ full settlement of case
_____ partial settlement
_____ no settlement of the case

For each question below, please circle the response that reflects your opinion, using the following key for your answers: 1="Excellent!"; 2="Good"; 3="Adequate"; 4="Poor"; 5="Terrible!"

1. How efficient was the procedure of court referral and arranging the mediation session? 1 2 3 4 5
2. How was the mediator at explaining mediation? 1 2 3 4 5
3. During the mediation session(s), how was the mediator at:
 - a. Giving you opportunities to express your views? 1 2 3 4 5
 - b. Understanding your interests and needs in this dispute? 1 2 3 4 5
 - c. Treating you with fairness and respect? 1 2 3 4 5
4. How was the mediator at remaining neutral? 1 2 3 4 5
5. How well were the legal issues of the case identified and discussed during the session? 1 2 3 4 5
6. How was the mediator at allocating appropriate time for the mediation without rushing you to reach an agreement or dragging out the process? 1 2 3 4 5

_____ Moved too quickly _____ Moved too slowly _____ Paced right

7. If you reached full or partial agreement,

a. To what extent was the mediator responsible for it? 1 2 3 4 5

b. To what extent do you think the mediation saved you money in resolving this case? 1 2 3 4 5

c. Please "guesstimate" how much money saved: \$_____

d. To what extent do you think the mediation saved you time in resolving this case? 1 2 3 4 5

e. Please "guesstimate" how much time saved:
_____ hours of attorney time _____ hours of your time

8. If you reached full settlement, in your opinion would the case have settled later without mediation? ____ yes ____ no

9. If you reached only partial agreement, to what extent was the mediator helpful in identifying possible areas of future agreement? 1 2 3 4 5

10. From this experience, how satisfactory do you think mediation is to resolve other disputes in which you might be involved? 1 2 3 4 5

11. Overall, how would you rate the mediation process in your case? 1 2 3 4 5

12. How appropriate was the fee? ____Too High ____Too Low ____About Right

13. How helpful was it that the mediator was a lawyer? ____Very ____Somewhat ____Not

COMMENTS: _____

THANK YOU!!